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No. 86-1280

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

STATE OF TENNESSEE,
Petitioner,

vs.

JOHN HERRINGTON, Secretary of the
United States Department of Energy,
Respondent.

On Petition For Writ Of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

BRIEF OF AMICUS CURIAE

Americans for Clean Energy, Environmental Policy Institute, Natural Resources Defense Council, Natural Rights Center, New England Coalition on Nuclear Pollution, The Sierra Club, Tennessee Environmental Council, Tennessee Nuclear Waste Task Force, and Tennessee Valley Energy Coalition

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QUESTIONS PRESENTED

1. Did the United States Department of Energy (DOE) violate the rights of the State of Tennessee under the Nuclear Waste Policy Act of 1982 (NWPA) in refusing to "consult and cooperate" with Tennessee officials in determining the suitability of sites in Tennessee for a (first-of-its-kind) facility to process and store spent nuclear fuel generated by the nation's civilian nuclear power plants?

2. *When* does the NWPA require DOE to "consult and cooperate" with Tennessee officials in determining the suitability of sites in Tennessee for a nuclear waste storage facility?

(A) Does the NWPA require consultation and cooperation with Tennessee *when* DOE evaluates the suitability of areas in Tennessee for a nuclear waste facility?

Or

(B) Does the NWPA require consultation and cooperation *only* upon completion of DOE's planning process and *after* Congress authorizes site-specific, design-specific plans to construct the facility in Tennessee?

3. In light of the clear congressional mandate that DOE engage in "meaningful" consultation and cooperation with potential host states for proposed nuclear waste storage facilities, did the Court of Appeals misapply *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), by deferring to a DOE interpretation of the NWPA that calls for consultation and cooperation with Tennessee only *after* congressional authorization of DOE's proposed site-specific, design-specific plan to construct a facility in Tennessee?

4. Do the District Courts or the Courts of Appeals have original and exclusive jurisdiction over lawsuits arising out of 42 U.S.C. § 10161?

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BRIEF OF AMICUS CURIAE

Amici environmental and public interest organizations, Americans for Clean Energy, Environmental Policy Institute, Natural Resources Defense Council, Natural Rights Center, New England Coalition on Nuclear Pollution, The Sierra Club, Tennessee Environmental Council, Tennessee Nuclear Waste Task Force, and Tennessee Valley Energy Coalition, respectfully urge that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on November 25, 1986. The issues presented on review are timely, substantial and of great significance to the amici organizations and to the parties and interests which they represent. Both parties have consented to the entry of this Brief of Amicus Curiae.

INTEREST OF AMICI

Amici Curiae are nine independent, nonprofit, non-governmental, membership organizations concerned with and affected by national nuclear waste management issues.

Americans for Clean Energy is a regional environmental organization concerned with the health and safety of the people of Oak Ridge, Tennessee and its surrounding area. Americans for Clean Energy has offices at Box 77, Kingston, TN, 37763.

The **Environmental Policy Institute** is a nonprofit public interest organization engaged in research, public education, litigation and lobbying. The Institute is actively involved in formulating national and international nuclear waste policy. Organizational headquarters are at 218 D Street SE, Washington DC, 20003.

The **Natural Resources Defense Council** is a nonprofit membership organization dedicated to protecting America's natural resources and to improving the quality of the human environment. The organization's headquarters are at 122 East 42nd Street, New York NY, 10168.

The **Natural Rights Center** is a regional, nonprofit, public interest law project with offices at 156 Drakes Lane, Summertown TN, 38483. The Center actively represents the interests of its members in governmental actions having significant transgenerational implications.

The **New England Coalition on Nuclear Pollution** is a nonprofit membership organization with offices at Box 545, Brattleboro, VT, 05301. The Coalition has actively pursued safe and effective resolution of nuclear waste issues in administrative and court proceedings for the past 20 years.

The **Sierra Club** is a nonprofit organization with 350,000 members dedicated to the preservation of the natural environment. Principal offices are at 530 Bush Street, San Francisco, CA 94108.

The **Tennessee Environmental Council** is a nonprofit association of citizens and organizations dedicated to the conservation of Tennessee's natural resources and protection of the public health. Its 34 organizational members include state and local chapters of the American Camping Association, the American Lung Association, the Audubon Society, Church Women United, the Izaak Walton League, the League of Women Voters, Tennessee Conservation League, Tennessee Forestry Association, Tennessee Recreation and Parks

Association, Tennessee Scenic Rivers Association, and the Wildlife Society. Principal offices are at 1720 West End Ave, Nashville TN, 37203.

The **Tennessee Nuclear Waste Task Force** is a coalition of nine environmental groups in the Southeastern United States having interest and expertise in the proposed transportation and retreivable storage of nuclear waste. The Task Force has offices at Route 6, Box 526, Crossville TN, 38555.

The **Tennessee Valley Energy Coalition** is a statewide nonprofit environmental organization with headquarters at 1407 East Fifth Avenue, Knoxville TN, 37917.

REASONS FOR GRANTING THE WRIT

THIS CASE PRESENTS A SIGNIFICANT MISCONSTRUCTION OF THE NUCLEAR WASTE POLICY ACT WHICH, IF SUSTAINED, WILL IMPOSE, IN DIRECT CONTRAVENTION OF THE WILL OF CONGRESS, FAR-REACHING LIMITATIONS UPON THE RIGHTS OF STATES AND AFFECTED LOCALITIES TO HAVE FAIR AND MEANINGFUL PARTICIPATION IN DECISIONS AFFECTING LOCAL PUBLIC HEALTH AND SAFETY.

The Nuclear Waste Policy Act (NWPA) includes provisions for State and Domestic Nation participation in the development of monitored retrievable storage (MRS) facilities for commercially generated nuclear waste.[1]

The intention of Congress was to insure that the Department of Energy (DOE) consults and cooperates with states in which there are potentially acceptable MRS sites, in order to resolve all significant concerns regarding health, safety, environmental, and economic impacts. Under the

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1. 42 U.S.C.§ 10137 provides in relevant part:

> **(b) Consultation and cooperation**
> In performing any study of an area within a State for the purpose of determining the suitability of such area... the Secretary shall consult and cooperate with the Governor and legislature of such State... in an effort to resolve the concerns of such State... regarding the public health and safety, environmental and economic impacts of any such repository.

provisions incorporated by 42 U.S.C. § 10161(h), the Department of Energy is required to notify an affected state within 90 days of *any* study related to identification of a potentially acceptable MRS site.[2]

Failure by DOE to recognize the NWPA process in its extensive site screening and identification studies has eliminated meaningful input by Tennessee during MRS site selection. The district court found that DOE violated the NWPA in refusing to permit state participation in the selection of three candidate sites in Tennessee and enjoined DOE from submitting its "fatally flawed" proposal to Congress. In a split opinion, the Circuit Court adopted DOE's incredible interpretation of the NWPA and ruled that DOE did *not* have to consult and cooperate with Tennessee until *after* Congress had authorized construction of the waste facility.

In her majority opinion, Judge Kennedy reviewed the legislative history of the NWPA and concluded that Congress had two main objectives in mind when creating the processes for siting nuclear waste dumps. The first was meaningful participation by affected states and Native American nations in order to preserve their rights to protect local health and safety. The second objective was timely resolution of the nuclear waste dilemma. In the majority's view, the second objective was preeminent. Where a conflict between the two goals arises, the balance must be struck on the side of speed.

> "Adoption of the State's position would defeat the second goal, though it would further the first. The DOE's interpretation, on the other hand, would further the second goal, while impeding the first. In such an instance, we must adopt the DOE's position."

Tennessee v. Herrington, 806 F.2d 642, 653 (6th Cir.1986).

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2. State participation was an important subject of debate in Congress during the drafting and passage of the Act. The House Report concluded:

> [P]rior to such time as a site has been approved for licensing and repository construction, states and tribes have rights to receive all relevant information from investigations, to participate in planning of environmental assessments and site characterization activities and to make recommendations regarding other aspects of conduct of the investigations which affect the social and economic well-being of citizens of the state or tribe.

H.R. Rep. No. 491, 97th Cong., 1st Sess. 45, *reprinted in* 1982 *U.S. Code Cong. & Ad. News* 3792, 3811.

In actuality, adoption of the State's position would only hinder the second goal (by setting the program back a few months while siting studies were reviewed), while adoption of the DOE's interpretation totally destroys the goal of meaningful state participation (since the State will be allowed input only after Congress has authorized both the site and the design for the facility).

The whole idea of rushing to dispose of nuclear wastes, which the Court of Appeals found to be of overriding importance, is exceedingly unwise. The health hazard created by the byproducts of the nuclear fuel cycle will linger for hundreds of thousands of years, longer than any previous artifact of civilization. Whether these wastes are emplaced this year or next year is almost meaningless on that time scale. The speed objective is mainly for the benefit of the utility companies, which will have to spend less money storing these wastes if DOE will take possession now instead of a year from now.[3] From the standpoint of protecting the public health and the public interest, undue speed is both unwise and unnecessary. Democratic debate and the system of federalism

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3. Commercial reactor fuel is currently changed about once every three years, and the spent fuel is stored in cooling pools within each reactor's containment dome. The fuel is not changed because it has lost its potency. On the contrary, irradiation within the reactor for three years increases the quantity of transuranic and other fissionable materials, like plutonium, americium, curium, neptunium, and technitium, making the fuel more radioactive, not less. It is removed because it is deemed to be too volatile, too unstable, and too unpredictable to use after three years. Entrapped within the spent fuel's cladding are a number of radioactive gases like krypton, xenon, and radon. Normal stress on the fuel assemblies creates small cracks in the fuel, so that some percent of these gases and metals escape into the water coolant in the spent fuel pools. Filtering of the water and containment air removes many of these radioactive products. The remainder reach the environment surrounding each nuclear plant and are taken up in the food chain where they eventually cause a small but statistically certain amount of cancers, birth defects and ill health in subjected populations. It is Secretary Herrington's proposal to collect 70,000 of these spent fuel assemblies (containing 15,000 metric tons of uranium fuel) at one storage facility in Tennessee where they can be stored in dry casks in an open field until such time as deep geological emplacement is prepared or the consensus, technology and economic incentive exist to extract the plutonium and uranium oxides to make fresh reactor fuel or nuclear warheads.

may consume more time, but should, in the end, produce the best result.

In his vigorous dissent, Judge Harry Wellford defended the clear intention of Congress to provide ample state participation at every stage of the nuclear waste debate. He found his panel's interpretation of the NWPA to require consultation with the state only after formal authorization of the specific site and design was "unreasonable and unacceptable."

As Judge Wellford indicated, the issues in this case run to the very heart of the nuclear waste debate. Will decisions affecting the life or death of millions of people, some of whom will not be born until 1,000 years from now, be decided by democratic processes, or will they be decided by the DOE? Judge Wellford wrote:

> "The decision in this case not only resolves a serious dispute for the State of Tennessee in its efforts to protect its environment and citizens, but will have important ramifications for the whole process of selecting nuclear waste disposal sites in the United States. It represents the first appellate consideration of a substantial portion of the Nuclear Waste Policy Act."

Tennessee v. Herrington, 806 F.2d 642, at 655.

CONCLUSION

For the reasons set forth above, Amici support the arguments of the State of Tennessee and respectfully request that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully Submitted,

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APPENDIX

STATUTES IN ISSUE

42 U.S.C. § 10161:

(h) Participation of States and Indian tribes.

Any facility authorized pursuant to this section shall be subject to the provisions of sections 10135, 10136(a), 10136(b), 10136(d), 10137, and 10138 of this title. For purposes of carrying out the provisions of this subsection, any reference in sections 10135 through 10138 of this title to a repository shall be considered to refer to a monitored retrievable storage facility. (Pub. L. 97-425, Title I, §141; 96 Stat. 2241)

42 U.S.C. § 10137:

(a) Consultation with States and affected Indian tribes.

(1) The Secretary, the Commission, and other agencies involved in the construction, operation, or regulation of any aspect of a repository in a State shall provide to the Governor and legislature of such State, and to the governing body of any affected Indian tribe, timely and complete information regarding determinations or plans made with respect to the site characterization, siting, development, design, licensing, construction, operation, regulation, or decommissioning of such repository.

(b) Consultation and cooperation.

In performing any study of an area within a State for the purpose of determining the suitability of such area for a repository pursuant to section 10132(c) of this title, and in subsequently developing and loading any repository within such State, the Secretary shall consult and cooperate with the Governor and legislature of such State and the governing body of any affected Indian tribe in an effort to resolve the concerns of such State and any affected Indian tribe regarding the public health and safety, environmental and economic impacts of any such repository. In carrying out his duties under this part, the Secretary shall take such concerns into account to the maximum extent feasible and as specified in written agreements entered into under subsection (c) of this section.

CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Brief of Amicus Curiae have been forwarded to the below listed counsel via first-class U.S. Mail, postage prepaid, on this the 4th day of March, 1987:

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